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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE FRANKFORT MARINE, ACCIDENT & PLATE GLASS INSURANCE COMPANY, a corporation,

Plaintiff in Error,

vs.

JOHN B. STEVENS & COMPANY, a corporation,

Defendant in Error.

No. 2397

Brief of Plaintiff in Error

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STATEMENT OF THE CASE.

This action was brought by defendant in error to recover from plaintiff in error on an Employer's Liability Policy issued by it.

While this policy was in force I. B. Merrill, one of the employees of defendant in error, sustained an injury while in the course of his employment and brought suit in the Superior Court of Pierce County, Washington, recovering a judgment for

damages against defendant in error, which was paid by it. This action was brought for the purpose of recovering such part thereof as was covered by the policy.

In the suit brought by Merrill he claimed that while he was attempting to pass, in the usual way, from the platform of defendant in error's warehouse to a freight car that stood on a track a few feet away, he stepped on the edge of a hopper used for the purpose of conveying the grain from the freight car to the warehouse, and that one of the planks constituting the side of the hopper split and part of it broke off, causing him to fall on his side, inflicting on him serious injuries. (Tr. of R., pp. 46-76).

The framework and appliance were both referred to as the hopper, but the framework was planked up on two sides with four posts and one end of it was at the platform and the other end at the car. It was a permanent structure. (Tr. of R., p. 46).

The complaint of defendant in error alleged the execution and delivery of the policy in the State of Washington and set up the rendition of the judgment against it in favor of I. B. Merrill, and alleged a performance by it of all the conditions of the policy.

The complaint was amended once or twice and the amended answer to the amended complaint denied, practically, all the material allegations of this

complaint, except the issuance of the policy, and as a part of its denial it affirmatively alleged that the policy contained a condition precedent, requiring defendant in error, "upon the occurrence of an accident, to give notice in writing thereof immediately, and at the latest within ten days." Plaintiff in error also set up, in the affirmative defense to its amended answer, the existence of this condition in the policy and alleged that, notwithstanding the fact that defendant in error well knew of the accident on or before the 19th day of July, 1909, yet it did not give notice thereof until the latter part of October or the first of November following. It also alleged that the condition requiring notice was a condition precedent by the terms of the contract.

The answer contained an additional affirmative defense in which it alleged that, at the time of the accident, on or before July 19, 1909, defendant in error well knew of the accident to Merrill, but that it did not give notice thereof until the latter part of October or the first part of November, and that by reason thereof plaintiff in error was deprived of the opportunity to investigate the accident; to preserve the testimony; the evidence became destroyed; the witnesses scattered; alterations were made in the structure on which the accident occurred, and it was no longer possible to successfully defend the action.

A reply was filed denying the allegations of the

amended answer and the case went to trial on these issues.

Defendant in error is a corporation and at the time of the injury it had a president and a secretary and two foremen, one of whom acted at night and at times in the place of the other one. Moore, the secretary, testified that his duties pertained entirely to the office and his relation to the work was not such as that he would likely know of accidents to the men, and that he relied on the foremen to inform him if any such accidents occurred, and that he never gave any instructions or directions to the foremen on the subject, and that no rules requiring the foremen to report accidents were made or promulgated by defendant in error. (Tr. of R., pp. 59-60).

While the testimony on this subject of Mr. Stevens, the president of plaintiff in error, was evasive, he finally admitted that he would not know of an accident unless he happened to be out around where the men were at work, and that he relied on Mr. Moore, the secretary, and Mr. Comstock and Mr. Bass, the foremen, to inform him if such accidents occurred, and that it was their duty to know of them. He admitted that he had established no rules or regulations with respect to the giving of notice and that he had not given them any instructions on the subject. His time was spent chiefly in the office, except as he might incidentally pass out through the warehouse where the men were at work. (Tr. of R., pp. 72, 81, 82).

Mr. Moore testified that on other occasions Mr. Comstock had reported accidents. (Tr. of R., p. 60). It appeared that Mr. Comstock and, in his absence, Mr. Bass, the foremen, had exclusive charge and control of the men, superintended their work, directed them in it, hired and discharged them, made out the payroll and conducted the practical operations of the work, except those parts which might be called financial or clerical.

Mr. Merrill testified that Mr. Comstock knew all about the accident to him at the time it happened (Tr. of R., p. 77), and that shortly afterwards Comstock told him that he had replaced the broken board (Tr. of R., p. 80), and that a few days after it happened, when Mr. Comstock was absent and Mr. Bass was acting as foreman in his place, he discussed it with Mr. Bass, in connection with making some changes and alterations in the hopper on which it occurred. (Tr. of R., p. 77).

It seems that Mr. Stevens, the president of defendant in error, was in the East at the time the accident to Merrill occurred, and that after Merrill had worked a few days subsequently to the accident his condition became such that he went home and an operation for the removal of his kidney was found to be necessary. He telephoned to Mr. Comstock, who came to his house. He discussed the accident with Mr. Comstock on this occasion. Subsequently Mr. Comstock visited him at the hospital and promised that his wages would be paid and

asked him if he intended to sue the company. (Tr. of R., p. 78). Comstock also told Mrs. Tute to inform Mrs. Merrill that his wages would go on and that he was as much entitled to them as other men who had been hurt in the employ of defendant in error. (Tr. of R., p. 95). He also talked to Mrs. Merrill, on the day Merrill was taken to the hospital, about Merrill's having been injured. He said that it was too bad that he had been hurt; that Mr. Stevens would stand good for his hospital bills and pay his wages. The wages were paid for some time, until on one occasion when Mrs. Merrill went to the warehouse to receive them she was told that they would not be paid any more. (Tr. of R., p. 84). These conversations were all denied by Mr. Comstock.

During the trial, when Mr. Merrill was on the stand, the Court directed the jury to disregard the conversations between him and Comstock unless they showed that Comstock knew of the accident at the time it occurred, and also directed him to disregard them unless Mr. Comstock was sent to the hospital by defendant in error and that they would regard them only in the event they showed that Comstock knew of the accident at the time it occurred. (Tr. of R., p. 79). One instruction directed to the testimony of both Mr. and Mrs. Merrill, to the same effect, was given to the jury by the Court, (Tr. of R., p. 163), and the Court also instructed the jury that they should receive with great caution the evidence of the witnesses as

to the declarations and admissions of Comstock. (Tr. of R., p. 167).

Defendant in error undertook to show that it had no knowledge of the accident until within a few days before the notice was given, some time during the last of October, 1909. This was disputed by plaintiff in error and the testimony in the case was directed chiefly to this question.

While defendant in error was proving its case in chief, its attorneys sought to extract from the Court an opinion on the question whether it should show at that time, as a part of its case, that plaintiff in error suffered no damage and that for that reason the questions of knowledge of the accident on the part of defendant in error and notice to plaintiff in error, were immaterial. The Court declined to express an opinion on that subject. (Tr. of R., p. 66). Defendant in error rested its case without any testimony on this subject, but in rebuttal it attempted to show that the case could have been defended as well at the time the notice was given as it could have been, if the notice had been given immediately after the accident. (Tr. of R., p. 106). This testimony was objected to by plaintiff in error, who took the position that the question whether it sustained any damage by a failure to give notice in accordance with the requirements of the policy was immaterial, because the condition requiring notice was a condition precedent both by its nature and by the express provisions of the policy.

During the testimony of Merrill, one of the witnesses for plaintiff in error, he stated that he discussed the accident, a day or two after the injury, with Mr. Comstock; that he told him the board had broken off and that Comstock said it ought to have been fixed, and that Comstock then told him he had knocked off the piece of the board that was left on the hopper and had taken the bottom board and put it there. (Tr. of R., pp. 77-80). This testimony was offered for the purpose of corroborating Mr. Merrill in his statement that Mr. Comstock knew of the accident, as shown by the fact that he had repaired and altered the hopper after the accident.

The evidence offered by defendant in error for the purpose of showing that plaintiff in error had not been damaged was the testimony of Mr. Comstock, who testified only in rebuttal. He contradicted Mr. Merrill with reference to the alterations in the hopper. In his testimony on this subject he stated that no change in the hopper was made except with reference to the cover on it, which change would have had no bearing whatever on the question whether making the change indicated a knowledge of the accident. His testimony on this subject went somewhat beyond the mere contradiction of Mr. Merrill, but it was difficult to draw the line and it was not objected to.

Defendant in error then proceeded to show by Mr. Comstock that all the employees and witnesses

were as much available at the time the Merrill suit was begun as they were at any time after the accident. There was only one witness to the accident, as shown by the report of accident, and his name was Busard. When counsel for defendant in error undertook to interrogate the witness about Busard's presence, the testimony was objected to because it was irrelevant and immaterial and for the reason that it made no difference, the reason and purpose of the objection being made plain and manifest. Defendant in error was permitted to prove that Mr. Busard was present and could have been used as a witness if plaintiff in error had defended the suit, but it turned out on cross-examination that he was missing at the time of the trial and that defendant in error spent much money endeavoring to find him, but was unable to do so. (Tr. of R., pp. 106-107). Defendant in error defended the case itself, plaintiff in error having refused to do so.

On the cross-examination of Comstock, for the purpose of contradicting him and breaking down the force of his testimony, plaintiff in error went into the question of the alterations that were really made in the hopper and demonstrated that his testimony in chief was untrue, and it also thus showed that it was in conflict with his testimony on the trial of the Merrill case, and this cross-examination necessarily developed the fact that after the accident and before notice of it was given to plaintiff in error, the entire hopper was reconstructed and the very plank which

Merrill claimed broke off with him, if it had ever been put back, was subsequently knocked off and thrown away, and the physical condition of the hopper at the time of the accident was no longer susceptible of satisfactory proof. (Tr. of R., pp. 108 to 110).

This testimony was brought out on cross-examination for the purpose of exposing the falsity of Comstock's testimony in chief, but at the same time it showed acts on the part of defendant in error between the time of the accident and more than ten days after it occurred, and more than ten days after it knew of it, which practically made it impossible for plaintiff in error to have successfully defended the case, if it had desired to do so.

Plaintiff in error introduced no evidence on the subject of the damage sustained by it by reason of the failure to give notice, taking the position that this question was immaterial and that, if it was not, the damage had been shown by the testimony of defendant in error.

Plaintiff in error requested the Court to instruct the jury that if they believed that Comstock knew that Merrill had met with the accident, in determining whether this knowledge was to be treated as the knowledge of the plaintiff, it made no difference how it was acquired by him and that it was not necessary that it should have been acquired by him while in the course of his duties. This instruction was refused and the Court gave two

instructions presenting the contrary view, the first one relating to the testimony of Merrill and Mrs. Merrill in relating to the conversations with Comstock at the house and at the hospital, which it was claimed showed that Comstock knew of the accident, or was at least informed of it at that time. (Tr. of R., pp. 175, 176, 156, 163, 164). The Court instructed the jury that knowledge acquired by Comstock in this way was not the knowledge of the principal, unless it was acquired while acting in the course of his employment.

In the second instruction the Court informed the jury that any knowledge or information that Comstock might have acquired concerning the accident, while visiting at Merrill's house or at the hospital, would not be the knowledge of defendant in error unless he was there to see Merrill in the discharge of his employment.

On the trial plaintiff in error requested the Court to instruct the jury that the condition requiring notice was a condition precedent and that, if there was a breach of it, defendant in error could not recover, and that the question whether plaintiff in error suffered any damage by reason of the failure to give the notice was immaterial in the case. (Tr. of R., p. 173). Plaintiff in error refused to defend the case because of the alleged failure to give notice as required by the terms of the policy. The Court not only refused to give this instruction, but instructed the jury that, if the

witnesses were available, and if it was possible to show the condition of the hopper, etc., and if it appeared that plaintiff in error could have successfully defended the case at the time the notice of the injury was given, then the failure to give notice was no defense. (Tr. of R., pp. 162, 163). These instructions are more fully referred to in the assignment of errors.

According to the view taken of the case by the Court, if plaintiff in error suffered no damage by reason of a failure to give the notice within the time required by the policy, a failure to give the notice within such time was no defense. It was, however, incumbent on plaintiff in error, under the view of the law adopted by the Court, to show knowledge of the accident and a failure to give the notice within the time required by the policy, because this was the breach of the policy which constituted a defense, in the event defendant in error failed to show that plaintiff in error suffered no damage by the delay in the giving of the notice.

In the complaint in the suit of Merrill against defendant in error, it was alleged that the accident occurred in July, 1909. Defendant in error set forth in its answer that the accident occurred in June, 1909. For some reason the parties had a controversy in that action about the time of the accident, although it did not appear to be very material. In this action, in plaintiff in error's answer, it set up that the accident occurred on

June 15, 1909, but that no notice was given until the latter part of October. Merrill testified in this case that the accident occurred on July 19, 1909. Comstock showed that he did not know of the accident because he was not in Tacoma at that time and that therefore the testimony of Merrill that he knew of the accident when it occurred, could not be true.

Apparently it occurred to defendant in error to take advantage of this dispute as to the time when the accident occurred and, accordingly, just before the trial, defendant in error amended his complaint in this action by interlining that the accident occurred on July 19, 1909, and thus indicated an intention to make the date of this accident material.

In its amended answer to the amended complaint plaintiff in error alleged that the accident occurred on or before July 19, 1909, for the purpose of avoiding an affirmative allegation as to when it did occur. At the trial it was contended by defendant in error that Mr. Merrill did meet with some slight injury in June, but that the injury for which he recovered damages occurred in July, and that Comstock was absent at that time and knew nothing about it.

In its instructions to the jury, when the Court undertook to state the issues in this case, he stated that the answer of plaintiff in error alleged that the accident occurred "on or about July 19, 1909." An exception was taken to this statement of the

issues and the attention of the Court was called to the matter, but he did not see fit to correct it.

Plaintiff in error thinks this was material because it gave color to the claim of defendant in error that the accident for which Merrill recovered was a different one from the one of which Comstock admitted that he had notice, which he said occurred in June and which he claimed was a slight one.

From the foregoing statement it will be seen that two main issues were submitted to the jury.

FIRST: Did defendant in error have knowledge of the accident?

SECOND: Was plaintiff in error damaged by the failure to give notice of the accident?

It is impossible to ascertain what was the conclusion of the jury as to these issues. The verdict may have been based on the theory that defendant in error did not know of the accident. It may have been based on the theory that it did know of the accident, but that plaintiff in error was not damaged by its failure to give the notice. The rulings and the instructions of the Court with respect to either of these issues may have determined the verdict of the jury.

This full statement of the case is made by plaintiff in error for the purpose of aiding the Court in a ready understanding and comprehension of the questions involved.

SPECIFICATIONS OF THE ERRORS ON WHICH PLAINTIFF IN ERROR RELIES.

I.

For the purpose of showing that Comstock knew of the accident to Merrill and that he knew when Merrill was at the hospital that he had met with the accident, and was then suffering therefrom, and that he knew that he had met with the accident while performing the work of defendant in error, as to which Merrill had already testified (Tr. of R., p. 77), plaintiff in error showed the following conversation between Comstock and Merrill at the hospital in the first part of August, to-wit (Tr. of R., p. 78):

"Q. At the time you went to the hospital did you have any conversation with Mr. Comstock about your accident or condition?

"A. He was telephoned to and he comes to the house and talked to me, and he said they calculated to do what was right about paying my wages, and he came to the hospital to see me and asked me if I was going to bring suit against the company, and I told him I had nothing to say and to go ahead and do something and he said he would, too.

"He said they had never had a suit against the company and they wouldn't like to have one brought because they were willing to do anything to get along, and I told him to go ahead and do so.

"He helped pack me out of the house to the ambulance to take me to the hospital."

That thereupon the Court said to the jury, in reference to the conversation at the hospital:

"Now, gentlemen of the jury, regarding this conversation at the hospital, to which objection is made, the Court instructs you that it is not everything that a man who is an agent for a corporation; that everything that he happens to learn binds the corporation. It is only that knowledge that comes to him while he is acting for the corporation in the scope of his employment. There has been testimony in the case regarding what Mr. Comstock learned at the time this accident happened. Now, with regard to these conversations at the hospital, there is no testimony that the company sent Mr. Comstock to the hospital, and, there being nothing to that effect, you are to disregard that as binding the plaintiff company, the John B. Stevens Company, and only consider it to this extent: That is, as to enabling you to determine what he learned—he, Comstock, learned—when this accident happened. If those conversations are in effect an admission on his part that he did know from the beginning that this man was hurt in the mill, you will consider it to that extent, but, so far as the company is concerned, you will disregard any admissions he made that the company was going to fix it up, or going to make it good, or all right and all that. You will disregard that, because there was nothing to show that he was on the business of the company. (Tr. of R., p. 79).

Plaintiff in error contends that the Court erred in informing the jury that it was only knowledge that came to an agent while he was acting for the corporation in the scope of his employment that bound the corporation; also in informing them that there was no testimony that the company sent Comstock to the hospital, and that therefore they were to disregard the conversation as binding the plaintiff and consider it only to the extent of enabling

them to determine what Comstock learned when the accident happened; also in informing them that they would disregard the conversation unless it was in effect an admission that he knew from the beginning that the man was hurt in the mill; and that it also erred in informing them that they would disregard the admissions Comstock made that the company was going to fix it up or make it good, because there was nothing to show that he was on the business of the company; and that the Court erred also in informing the jury that there was nothing to show that Comstock was on the business of the company.

II.

Error of the Court in admitting testimony to show that Oren Busard, the chief witness to the accident, was still around town in Tacoma and was available as a witness at the trial of the case of Merrill against Stevens, the testimony being offered to show that no damage was sustained by the delay in the giving of the notice. The testimony is as follows:

"Q. Now, calling your attention to one Oren Busard, was he still around town at the time this notice was received from Fitch & Jacobs and notice given to the insurance company?

"A. I am not sure where Oren Busard was at the time. He was here shortly afterwards, but he may have been working there at the time, but he was either working for John B. Stevens & Company or working around town."

The men I have mentioned constituted all the witnesses in the Merrill case except the doctors and excepting Busard. The witnesses I mentioned were the witnesses in the Merrill action, except Busard. I am a little dark in regard to Busard. I would like to explain if you will allow me. Busard was with us and worked with us some time about the time this summons and complaint was served, but he was not a witness for us. He disappeared before the suit was tried. (Tr. of R., p. 106).

This testimony was admitted over the objection of the plaintiff in error.

III.

The Court erred in refusing to give to the jury instruction numbered III, requested by plaintiff in error, as follows:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence that Mr. Moore was one of the officers of the plaintiff and that it was one of his duties to obtain knowledge of accidents to employees of the plaintiff occurring while in the course of their employment at its warehouse, and if you further believe from a fair preponderance of the evidence that Mr. Moore did not exercise such a personal, reasonable direction, control and supervision over the employees as to render it likely or probable that he himself would obtain knowledge of the accidents to the employees within a reasonable time after they occurred, and that he took no precautions to obtain such knowledge himself and did not exercise a reasonable degree of care and diligence in the supervision and management of the business as would give to

him such knowledge, but that he relied and depended on some employee of the company to give him such information, and if you believe from a fair preponderance of the evidence that this employee had knowledge of the accident to Merrill, for which he recovered damages against the plaintiff, and knew that it occurred at plaintiff's warehouse while he was at work there for it, but that he did not convey such knowledge to the said Moore, or to any officers of the company, and that by reason of such failure on his part neither Moore nor any of the officers of the plaintiff company had knowledge of the accident until long after it happened, and did not give notice of it to the defendant until more than ten days after this employee's knowledge of it and after he could have informed them of it, then and in such event you are instructed that the plaintiff cannot plead lack of knowledge of the accident as an excuse for a failure to give notice within ten days, according to the terms of the policy." Tr. of R., p. 169).

To which failure and refusal plaintiff in error duly excepted.

IV.

The Court erred in refusing to give to the jury instruction numbered IV, requested by plaintiff in error, as follows:

"You are instructed, gentlemen of the jury, that even if you believe from a fair preponderance of the evidence in this case, that none of the officers of the plaintiff corporation knew of the accident to Merrill, yet this does not necessarily show a lack of knowledge on the part of the plaintiff, because the knowledge of some individual other than the officers of the plaintiff might be knowledge of the plaintiff, you are therefore instructed, that if you believe from a fair preponderance of the evidence

that Mr. Comstock, the foreman of the plaintiff, superintended and directed the men in the exercise of their work on the premises and personally supervised them while so engaged, and that the character of his duties was such that he would know when the employees in his charge met with accidents, and that he employed and discharged the men and reported their time to the plaintiff; and if you further believe from a fair preponderance of the evidence that the officers of the plaintiff did not personally supervise the work of the men or the men while engaged in it, and did not occupy such a relation or position to the men and their work as would render it reasonably likely and probable that they would know of the accidents to the men, and if you further believe from a fair preponderance of the evidence that they established no rules or regulations requiring or directing anyone to report to them accidents to the employees while engaged at their work on the premises, and if you further believe from a fair preponderance of the evidence that none of the officers paid any attention to the question or subject of such accidents to the employees, except one, and that he assumed or was charged by virtue of his position with the duty of knowing of and ascertaining such accidents and reporting them; and if you further believe that this officer gave no directions to anyone else to report accidents to him; established no regulations or rules on the subject, and that he performed such duties and remained in such a place as that it was not reasonable, likely or probable that he would know of such accidents; and if you further believe from a fair preponderance of the evidence that this officer relied on the foreman, Mr. Comstock, to report to him such accidents to employees and for this reason made no supervision and took no steps to ascertain about such accidents; and if you further believe that Mr. Comstock, the foreman, knew that Merrill met with the accident while at work for plaintiff at its warehouse, for which he recovered damages

against the plaintiff, but that for any reason he failed to inform any of the officers of the plaintiff thereof, and that by reason of his failure to give such notice and information to the said officers, they did not know of it and that they did not give notice thereof until more than thirty days after the accident and after Comstock knew of it, then and in that event you will find that the plaintiff knew of the accident when Comstock knew of it."

To which failure and refusal plaintiff in error duly excepted. (Tr. of R., p. 171).

V.

The Court erred in refusing to give to the jury instruction numbered V. requested by plaintiff in error, as follows:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case, that the plaintiff did not give notice of the accident to Merrill within the time required by the policy, as explained to you in these instructions, it is not necessary that the defendant should show that it suffered any damage by reason of the failure to give the notice. The difficulty of determining what effect the delay and the failure of the plaintiff to give the notice may have had on the result of the case of Merrill against Stevens, and the difficulty of showing whether the delay in the giving of the notice produced conditions which controlled or affected the decision of the jury in the case of Merrill against the plaintiff, are all presumed in law to have been provided against by the requirement of the policy making the plaintiff's right of action depend on the giving of the notice."

To which failure and refusal plaintiff in error duly excepted. (Tr. of R., p. 173).

VI.

The Court erred in refusing to give to the jury instruction numbered VII, requested by plaintiff in error, as follows:

"You are instructed, that if the officers of the plaintiff did not exercise such a supervision over the management of the business and the control of the men and the performance of their work, as would render it reasonably likely or probable that they would know of such an accident to one of the men, and if they did not establish rules or regulations requiring or directing someone else to give them notice or knowledge of such accidents, then you are instructed that the relation of Mr. Comstock, the foreman, to the management of the business and control and supervision of the men, was such that his knowledge of the accident was the knowledge of the plaintiff and that likewise, in his absence, the knowledge of Mr. Bass while acting as foreman of the men in the same manner, was the knowledge of the plaintiff, and particularly is it true that the knowledge of Mr. Comstock was the knowledge of the plaintiff if you believe from a fair preponderance of the evidence that Mr. Moore, one of the officers of the plaintiff, regarded himself as the proper person to acquire knowledge and give notice of such accidents, and if you believe that this duty was tacitly or expressly left to him by the other officers of the plaintiff and that he took no active steps with regard to the matter of acquiring knowledge of such accidents and established no rules or regulations on the subject, but depended on Mr. Comstock to give to him such knowledge."

To which failure and refusal plaintiff in error duly excepted. (Tr. of R., p. 174).

VII.

The Court erred in refusing to give to the jury instruction numbered IX, requested by plaintiff in error, as follows:

"You are instructed, gentlemen of the jury, that if you believe from a fair preponderance of the evidence in this case that Mr. Comstock knew that Merrill had met with an accident while engaged at the warehouse of the plaintiff, in determining the question whether this knowledge is to be treated as knowledge of the plaintiff, it makes no difference how this knowledge was acquired by Comstock. It is not necessary that it should have been acquired by him, in order to charge the company, while in the course of his duties for the plaintiff. If he actually knew of the accident to Merrill, the question whether he acquired this knowledge while discharging any of his duties as a foreman or employee of the plaintiff is immaterial."

To which failure and refusal plaintiff in error duly excepted. (Tr. of R., p. 175).

VIII.

The Court erred in instructing the jury as follows:

"The Court permitted certain testimony concerning conversations alleged to have occurred at Merrill's house, or at the hospital, between Comstock and I. B. Merrill and between Comstock and Mrs. Merrill. This testimony was admitted for a limited purpose, as the Court explained to you at the time. And in this connection you are instructed that the principal is charged with knowledge of all material facts of which the agent receives notice or acquires knowledge, while

acting in the course of his employment and within the scope of his authority, whether the agent informs the principal of such facts or not. But you are instructed that a principal is not charged with knowledge of any fact which the agent may acquire while not acting in the course of his employment, or of information which the agent acquired while attending to business of his own."

To which plaintiff in error duly excepted. (Tr. of R., p. 163).

IX.

The Court erred in instructing the jury as follows:

"Therefore, you are instructed that, if you find and believe from the testimony that I. B. Merrill met with an accident on July 19th, 1909, and that at that time the foreman, Comstock, was away on his vacation and did not know of the said accident, then you are instructed that any knowledge or information Comstock may have acquired concerning the accident while visiting at Merrill's house, or at the hospital unless he was there to see Merrill in the discharge of his employment by the plaintiff, would not be the knowledge of the plaintiff in this case, because not acquired by Comstock in the discharge of his employment or in connection with matters within the scope of his authority as an agent or employee of the plaintiff, John B. Stevens & Company."

To which plaintiff in error duly excepted. (Tr. of R., p. 164).

X.

The Court erred in instructing the jury as follows:

"And you are further instructed in this regard that if the defendant could have learned all of the facts concerning the condition of the hopper, the manner in which it was constructed, and all the facts relating thereto, from the witnesses, after notice was given, so that the charge or alteration in the hopper did not prevent the defendant from learning the condition of the hopper and satisfactorily establishing the same and its manner of construction at the time Merrill was injured, or the fact in connection with the alleged break of a board in the hopper, and that it was not prejudiced in its rights by reason of such alterations; then the fact that the hopper was altered, after the alleged injury to Merrill, would be immaterial and would not constitute grounds for the defendant refusing to accept and defend the suit brought by Merrill against John B. Stevens & Company."

To which plaintiff in error duly excepted. (Tr. of R., p. 161).

XI.

The Court erred in instructing the jury as follows:

"The Court further instructs the jury that the failure or delay in giving notice, even though plaintiff had knowledge of the accident, would not of itself be a defense to plaintiff's suit. In order to be a defense such failure or delay in giving notice must have been prejudicial to the insurance company's rights. Therefore, if notice was not given immediately as provided, yet if the jury believe from the evidence that said suit of Merrill could have been defended by said company to as good advantage as if notice had been sooner given as required, it would be bound to accept the accident and defend the suit. In other words, if the jury

believe that the witnesses to the accident and all evidence were available and that the suit could have been defended as well as if notice had been sooner given, the failure to give notice sooner would not in any event be a defense, even though plaintiff knew of the accident at all times, and you will find a verdict for plaintiff.

"Another matter in issue relates to the allegation that by reason of plaintiff's delay in giving notice of the accident the witnesses were scattered. If the jury believe that such delay in giving notice was due to the want of knowledge of said accident by plaintiff and that the plaintiff was ignorant of it and without fault on its part, as before explained, it would be immaterial that the witnesses were scattered, and you cannot find for defendant on that account."

To which plaintiff in error duly excepted. (Tr. of R., p. 162).

XII.

The Court erred in instructing the jury as follows:

"In this case there has been testimony concerning conversations and admissions, oral admissions. The Court instructs you that evidence of that kind should be accepted with great caution by the jury. Especially is that true where a considerable lapse of time has intervened between the time of these alleged admissions or conversations and the time the witness testified. One counsel has pointed out some reasons for that, too. In addition to those pointed out by counsel, would be the fallibility of the memory of the witness who undertakes to relate a conversation, as the meaning of persons often depends upon the arrangement of the words. The

same words arranged differently often give a different impression, or a word omitted here or substituted there may change the whole meaning of a conversation; therefore, that is why I instruct you that testimony of that kind should be accepted with caution."

To which plaintiff in error duly excepted. (Tr. of R., pp. 167, 168).

XIII.

The Court erred in instructing the jury as follows:

"For a further defense the defendant alleges in its answer that I. B. Merrill received the injuries referred to on or about the 19th day of July, 1909, and that plaintiff had knowledge of said accident and injuries to said Merrill at the time but gave no notice in writing to defendant or its representatives in this locality, until the latter part of October or first of November following." (Tr. of R., p. 149).

XIV.

That the court erred in failing and refusing to grant the motion of plaintiff in error for a nonsuit and dismissal of the case. (Tr. of R., p. 74).

SUCCINCT STATEMENT OF LEADING QUESTIONS OF LAW RAISED BY ASSIGNMENT OF ERRORS.

The statement of the case indicates that the following are questions of law raised by the record in this case:

FIRST: Where a foreman who is confessedly charged with the duty of superintending the employees and ascertaining when they are injured and of informing his employer of that fact, during the existence of his foremanship, discovers through conversations with him and his declarations, that one of the employees has been injured while in the discharge of his duties at the place indicated in the policy, and subsequently visits him where he is undergoing an operation on account of the injuries, and there conversations and declarations take place between them which show that the foreman had knowledge of the occurrence of the accident prior to that time, or that he acquired it then, was it not error for the Court, while admitting the conversations and declarations in evidence, to direct the jury that they should disregard them

(a) Unless they found that the foreman was sent to the hospital by the employer at the time of the conversations?

To say:

(b) That there was no testimony that he was so sent;

(c) That as there was no testimony that the foreman had been so sent, they would regard the conversations only so far as they might show what he learned at the time the accident happened.

(d) That they would regard the conversations only in the event they constituted an admission

on the part of the foreman that he knew from the beginning that the employee was injured.

(e) That they would disregard any admissions that the employer would fix it up or make it good, because there was nothing to show that he was on the business of the employer. (Assignment of Error I; Tr. of R., p. 25). An agreement to make it good was some evidence of knowledge as to the fact and the manner of the accident.

SECOND: If a foreman charged with the duties already indicated, discovers or learns, in any way, that one of the employees has met with an accident or injury while in the course of his employment on the premises, is it not error for the Court to instruct the jury, in dealing with this question,

(a) That the employer could not be charged with such knowledge unless it was acquired by the foreman while acting in the course of his employment?

(b) Was it not error for the Court under such circumstances to refuse to instruct the jury that the knowledge of the foreman during the time he was charged with the duty of finding out and reporting accidents to the employees, was chargeable to the employer, regardless of the question how and when this knowledge was acquired, if it was acquired during the existence of his foremanship and the continuance of his duties?

With such a foreman, charged with such a duty,

is not the discovery during the period of his foremanship at any time, place or under any circumstances, of a fact which it is his duty to discover, a matter entirely within the scope of his employment and strictly in the line of his duty?

If such a fact should be discovered by such a foreman, even while he was engaged for the moment in his own personal business, when he turned from that business to the performance and the discharge of his duties as foreman, was he not then charged with knowledge of the fact which he discovered during the period of his foremanship, even if he was not then engaged in the performance of any duty?

THIRD: Where the testimony showed that Comstock, while at the house of the employee, Merrill, for the purpose of assisting and conveying him to the hospital, engaged in conversations with Mrs. Merrill and Mrs. Tute and made declarations which showed that he knew of the accident which occurred to Merrill, and that he afterwards went to the hospital to see Merrill and certain conversations and declarations occurred there between them which gave him that knowledge, if he did not already have it, *was it not error* for the Court to instruct the jury that, if Comstock was away at the time when the accident to Merrill occurred, the knowledge subsequently acquired while visiting at the house or the hospital, would not be the knowledge of his employer unless he was there to see Merrill in

the discharge of his employment, and that, if he was not there in the discharge of his employment, the knowledge so acquired would not be acquired by Comstock in the discharge of his employment and therefore would not be in connection with matters within the scope of his authority as an agent or employee.

Was not this instruction particularly erroneous in view of the fact that the Court had already instructed the jury that unless Comstock had been sent to the hospital at the time by defendant in error, they would disregard the conversations that took place there, unless they showed that Comstock knew of the accident at the time it happened, and had at the same time told them that there was no evidence that Comstock had been sent to the hospital by defendant in error? In other words, when these two instructions are coupled together, do they not, in effect, say to the jury, that if they believe that Comstock, on account of his absence, did not know of the accident at the time it happened, the declarations and conversations at the house and the hospital should be disregarded as evidence, although they may have showed that he knew of the accident through knowledge of it that he acquired at that or at some previous time? (Assignment of Error XIII; Tr. of R., p. 35).

FOURTH: Where a policy of insurance undertakes to indemnify "against *loss* arising from a liability imposed by law," and the policy provides

that no right of action can be maintained until after the *payment of the damage* by the assured, and contains a *special warranty* or *stipulation* that notice of accidents shall be given within a fixed time, and where the policy also contains the further agreement that the *special warranties* and *stipulations* shall be treated as *conditions precedent*, was it not error for the Court to instruct the jury

(a) That the failure to give notice within the terms of the policy, constituted no defense to the action, unless it appeared that the insurance company had been damaged by such failure?

(b) Was it not error to refuse to instruct the jury that if the notice was not given within the time required by the terms of the policy, the assured could not recover?

(c) Is not such a condition requiring notice in a policy indemnifying "against loss from liability," a condition precedent in its nature and character and also by reason of the fact that it is required to be performed before the loss occurs, the loss being the payment of the claim of the injured man; and particularly is it not a condition precedent where the policy, in express terms, makes it one?

(d) If such a condition is a condition precedent, is not its breach fatal to the right of the assured to recover, regardless of the question whether the insurance company sustained any damage by its breach?

FIFTH: If a breach of the condition requiring the giving of notice within ten days after the happening of the accident, defeated the right of action on the policy, without regard to the question whether the insurance company sustained any damage by reason of its breach, did not the Court err in permitting defendant in error to prove that Busard, the witness to the accident, was still around town and available as a witness at the time the suit was brought? (Tr. of R., p. 106).

SIXTH: In view of the directions and instructions given by the Court to disregard the declarations and conversations between Merrill and Comstock at the house and the hospital, as set forth in assignment of error numbered I, if it was error for the Court to so instruct the jury, was it not still more erroneous, when, in the instruction set out in assignment of error numbered XII, the Court applied to the testimony of Mrs. Merrill the same instructions and directions, Mrs. Merrill having testified that Comstock told her, before Merrill was taken to the hospital, that he was sorry Merrill was hurt and that defendant in error would pay his wages? (Assignment of Error XII).

SEVENTH: In view of the fact that it was necessary to show knowledge on the part of Comstock that the accident to Merrill had occurred more than ten days prior to the time when the notice of the accident was given, and in view of the charcter of the declarations and conversations between Comstock and Merrill and Mrs. Merrill and Mrs. Tute,

was it not error for the Court to instruct the jury "that evidence of that kind" should be accepted with great caution by the jury? Was it not particularly erroneous for the Court to say to the jury that "one of the counsel had pointed out some reasons for this evidence being so regarded and that the Court would point out some additional ones," and to then proceed so to do?

As a matter of fact, considering the strong circumstances corroborating these conversations, the number of those who testified to them, and their probability, was it not error for the Court to single out these declarations and admissions and brand them with suspicion and impose on the jury the duty of regarding them with suspicion even if it should be deemed true by the Court that, under ordinary circumstances, oral conversations and admissions are to be received with caution? Did not the Court commit two mistakes with reference to this testimony, which was so important to plaintiff in error, first, in applying the abstract rule which the Court had in mind to the facts of this case, by a positive direction and instruction, and also by failing to leave to the jury the determination of the question whether the particular declarations and admissions in evidence in this case were of such a character as to require the jury to apply this rule to them or to justify them in so doing? Did not the Court err in enforcing on the jury the application of the rule to the particular admissions and declarations, instead of stating the general rule and

leaving it to them to say whether it should be applied to the particular admissions and declarations in question?

ARGUMENT.

FIRST ASSIGNMENT—DIRECTIONS TO DISREGARD TESTIMONY.

At the time when the ruling involved in this assignment was made, the testimony of Mr. Stevens, the president of defendant in error, and of Mr. Moore, the secretary thereof, and of Mr. Merrill, showed that Mr. Comstock had general supervision of the men and their work, employing and discharging them, and that he was relied on to report accidents to them coming under the policy and that he had done so several times before; that he had arranged for the payment of part of his wages to Merrill and they were paid by Mr. Moore on his recommendation, and that the question of the payment of his wages and the stopping of them had been left with Mr. Comstock and Mr. Moore by Mr. Stevens.

It appeared from Mr. Stevens's testimony that he knew Merrill was sick and that his wages were being paid, and that he left the payment of his wages to Comstock and Moore. (Tr. of R., p. 73). Merrill had testified that he met with the accident in July; that Comstock knew about it; that the serious result of the accident was not known until ten days or two weeks after the accident, when it was found

necessary to take Merrill to the hospital for the operation of removing his kidney. (Tr. of R., p. 77).

Comstock testified that the only accident he knew of was one occurring in June and that he did not know of the accident in July, and that the accident in June was slight and that Merrill continued at work.

In the conversations at the hospital, to which the Court referred in his ruling, Merrill testified that he discussed the accident with Comstock and that Comstock told him that the company would do what was right; would pay his wages; and that he asked him if he was going to bring suit against the company and said that they did not want a suit against them, and that Merrill told him to go ahead and do what was right. (Tr. of R., p. 78). These conversations took place in the first part of August, following the accident of July 19, 1909. The accident was not reported to plaintiff in error until the latter part of October, when suit was brought. The payment of the wages continued after this time and was discussed between Comstock, Moore and Stevens.

The conversations with Merrill showed that, at the time they took place, Comstock knew that Merrill was suffering from the consequences of the accident and the fact that he then arranged for the payment of the wages in pursuance of the power and authority which he had on that subject,

and the fact that this was subsequently ratified by defendant in error, made these conversations competent and relevant to establish knowledge on the part of Comstock and made it a question for the jury whether the arrangement made by Comstock about the wages was within his authority, and likewise made it a question for the jury to determine whether the subsequent payment of the wages in pursuance of this arrangement did not show that Comstock was acting within the scope of his authority.

If the fact that a third person has knowledge of a certain event, becomes material in an action, that fact is to be proved like any other. The acts and declarations of a person made at a time when his knowledge is material, are competent to establish such knowledge as fully as though they were the acts and declarations of a party to the action. Knowledge is a mental condition and while the person whose knowledge is the subject of inquiry is perhaps in a better position to speak on the subject than is anyone else, his admission or denial of knowledge is not conclusive against an adverse contention, and the contrary of his statement may be shown by any acts, declarations or circumstances from which it may be reasonably inferred. This is elementary.

"Ordinarily whether or not another person had knowledge of a particular fact is not capable of proof by the mere opinion or conclusion of a witness, although it has been held proper to permit a witness

to state that another person had knowledge of the fact, where he also states the facts indicating unmistakably that he knows whereof he speaks. It is proper to show that a party had knowledge of a fact by the testimony of a witness that he had informed such party of the fact."

8 Encyc. of Evidence, pp. 15 and 16.

See, also,

St Louis, A. & C. R. Co. vs. Dalby, 19 Ill. 352.

Acts of a party sought to be charged with knowledge of a fact, or statements by him in the nature of or constituting an admission of his knowledge, may be received in evidence against him, although collateral and foreign to the main subject.

"Wherever it is material to prove the state of a person's mind or what was passing in it and what his intentions were, you may prove what he said because that is the only means by which you can find out what his intentions are."

Sugden vs. St. Leonards, L. R. I. P. D. 154.

The rule admitting such evidence for such a purpose is an exception to the general rule in reference to hearsay evidence.

3 Wigmore on Evidence, 1714-15.

The person whose knowledge becomes material stands in the position of a party to the suit to the extent that the knowledge may be proved by the same character of evidence.

The application of this rule, we take it, does not depend, in any sense, on the question whether, at

the time of the declarations and conversations, Comstock was acting within the scope of his authority. On him was conferred the duty of ascertaining that the men were injured and reporting the fact of such injuries to his employer. It was by virtue of the duties thus imposed on him that his knowledge became material, and, to say the least, his acts and declarations showing such knowledge during the time when his possession of it was material, are admissible for the purpose of showing that during that period he possessed it. If Comstock had ceased to be foreman and had thus been relieved of his duties in respect to this matter, and had then acquired knowledge which it would formerly have been his duty to communicate, we would not contend that the evidence of his knowledge at that time would be admissible and we do not care to argue the proposition that the declarations made by him after he had ceased to be foreman and after he had been relieved of his duty of reporting accidents, would be admissible for the purpose of showing that he did possess knowledge at a time when its possession by him was material.

The Court seemed to lose sight of the distinction between the rule applicable to the state of facts shown in this case with respect to this question and the rule applicable in a case where it is sought to charge the principal by acts and declarations made by the agent with respect to some subject which

it is claimed was within the scope and limits of his authority.

In this case it was conceded that knowledge of Comstock that Merrill had been injured was knowledge of defendant in error and it was merely a question how this knowledge should be proved.

The Court first said that they would disregard the declarations and conversations unless they found that defendant in error *sent* Comstock to the hospital. As a matter of fact, if it was a part of the duties of Mr. Comstock to ascertain if men were injured while in his employment, to pay their wages, and to overlook them, it was not necessary that he should have been sent on this particular occasion by some officer of the company. He testified that he went there voluntarily, but it is a significant fact that he arranged for the payment of the wages.

The Court further told them that, as there was no testimony to the effect that he had been sent to the hospital, they would regard the conversations there only so far as they might show what Comstock had learned *at the time the accident happened*, and that they would regard the conversations only in the event they constituted an admission on his part *that he knew from the beginning* that Merrill was hurt. In other words, the Court informed the jury that any information as to the accident and injury to Merrill which Comstock acquired while at the hospital, should be disregarded by them

and that they should disregard all admissions of Comstock unless they were admissions that he knew of the accident from the beginning.

A very remarkable situation is presented in the instruction by the Court. He told the jury that if Comstock knew of the accident at the time it happened, his declarations to Merrill showing this fact should be regarded by them. The effect of the instruction, however, was to say to them, that if, however, he did not know of the accident at the time it happened, they should disregard evidence of any information about it that was conveyed to him at the hospital, or any declarations of his showing that he then knew or acquired knowledge of it. Merrill remained in the hospital about four weeks, leaving there some time the early part of September.

The idea of the Court seemd to be that if Comstock did not learn of the accident at the time it happened, no subsequent information on the subject acquired by him, would bind defendant in error unless he acquired it while actually engaged in the discharge of some duty.

It is a little remarkable that the Court should hold in this case that the duty of giving notice of an accident did not arise until knowledge of it was acquired, and that, if defendant in error did not know of the accident when it happened, it was not its duty to give notice of it until it did know of it, and then to say in these remarks to the

jury that the jury should disregard evidence showing that defendant in error acquired this knowledge at some subsequent time.

The testimony of Merrill as to the conversations between him and Comstock at the hospital demonstrated that, whether the accident happened in June or in July, Comstock then knew of the accident and that Merrill's condition was the result of it.

The Court also told the jury to disregard any admissions that defendant in error would fix it up or make it good because there was nothing *to show that he was on the business* of the company. On what theory the Court determined, in view of the testimony, that Comstock was not at the hospital or at the house on the business of the company, we are unable to determine.

The statement of the Court that there was nothing to show that Comstock was sent to the hospital or house, and the further statement that there was nothing to show that he was there on the business of the company, were both erroneous, for independently of the general circumstances connected with these visits and the duties imposed on Comstock, Mr. Stevens had already testified as follows:

"Yes, sir, I paid Mr. Merrill's wages for a time. I knew he was sick and finally went to the hospital I knew that one of his kidneys was removed. I think we paid part of his wages for three weeks.

I left the payment of his wages and the stopping of them to Mr. Comstock and Mr. Moore. I was away in September and it was during my absence when the boys stopped paying his wages." (Tr. of R., p. 73).

When Comstock told Merrill at the hospital that they would pay his wages and that they did not want any suit against the company on account of it, it can hardly be said, in view of the testimony of Mr. Stevens, that Comstock was not acting in the course of his duties or in the business of defendant in error when he made these remarks.

The admissions or declarations by Comstock that defendant in error would fix it up or make it good, which the Court directed the jury to disregard, were but a part of the declaration in which Comstock expressed the hope that Merrill would not sue defendant in error. We think these declarations were evidence that Comstock knew of the injury and accident to Merrill, of the most emphatic character. The idea seemed to be uppermost in the mind of the Court at all times, that Comstock must have been engaged in some duty at the warehouse when he acquired his knowledge, in order to affect defendant in error by it.

While we think it was not essential to the admissibility of the conversations showing knowledge on the part of Comstock, that he should have either been sent there or that he should have gone there on the business of the company, yet if the other

view of the question should be taken, this instruction wiped out all room for the contention on the part of plaintiff in error that he was either sent or that he was there on the business of the company.

This error is still further emphasized by the fact that the Court refused to give the instruction requested by plaintiff in error, referred to in assignment number XI, to the effect that if Comstock acquired knowledge of the accident it made no difference how he acquired it, and that it was not necessary, in order to bind defendant in error, that he should have acquired it while in the discharge of his duties as a foreman or employee of defendant in error.

The bad effect and the injurious character of this instruction was more far-reaching than we have indicated in this argument, and while this exact question will be more fully discussed in the argument on one of the other assignments of error, yet we call the attention of the Court to the fact that there were conversations and declarations between Comstock and Mrs. Merrill and Mrs. Tute at the time Merrill was taken to the hospital and while he was in the hospital, which showed that he then knew of the accident. These conversations and declarations also fell under the statement by the Court that there was no evidence to show that Comstock was sent to the hospital or that he was there on the business of the company, and the jury were

instructed that knowledge acquired by him when he was not on the business of the company was not chargeable to the company.

SEVENTH, EIGHTH, NINTH AND TENTH ASSIGNMENTS.

The instructions involved in these assignments correctly stated the law and they were given with important changes and alterations, but in giving them the Court injected into their midst the following, which completely limited and qualified them:

"Knowledge of any person if charged by the plaintiff with the duty of ascertaining whether men were hurt in any accident on the premises while at work for plaintiff, and informing plaintiff thereof, whether such person were Mr. Comstock or Mr. Bass or any other, if such knowledge was acquired by such person in the course of his employment it would be knowledge on the part of the plaintiff; if such person knew of Merrill's injuries, and knew that it was on his own premises and received while in the discharge of his duties. This would be true whether the person informed the plaintiff or any of its officers or not."

By this language the Court made the duty of giving notice or information by them depend on whether Mr. Comstock or Mr. Bass acquired knowledge of the accident while in the course of his employment.

We call the attention of the Court at this time specially to the fact that Mr Merrill testified that Mr. Bass knew of the accident and the manner in which it occurred shortly after the time of its

occurrence, and while he was acting as foreman in place of Mr. Comstock, who was away, and we call your attention further to the fact that Mr. Stevens and Mr. Moore both testified that they relied on Mr. Bass as well as on Mr. Comstock to inform them of accidents, and Mr. Stevens said that it was one of Mr. Bass's duties to do so; and we call attention to the further fact that the testimony of Mr. Merrill in this respect was not contradicted.

For the reasons indicated the instructions requested by plaintiff in error were not given in the form in which they were requested, the instruction quoted by us being injected into their midst as a part of one of them.

ELEVENTH, TWELFTH AND THIRTEENTH ASSIGNMENTS.

These assignments are based on the alleged error of the Court in refusing to instruct the jury that if Comstock knew that Merrill had met with an accident while engaged at the warehouse of defendant in error, it was not necessary, in order to charge defendant in error with this knowledge, that it should have been acquired by him while he was in the discharge of his duties. In this argument is also involved the error in the first assignment as well as the error in the instructions referred to in assignments 12 and 13, presenting the contrary view, and particularly in the giving of the instruction involved in assignment 13 to the effect

that any knowledge or information Comstock acquired concerning the accident while visiting at Merrill's house or at the hospital, would not be the knowledge of defendant in error, "unless he was there to see Merrill in the discharge of his employment."

We here desire to call the attention of the Court particularly to the language in quotations, because the Court had previously instructed the jury during the trial, as is pointed out in the argument on assignment of error I, that there was no evidence that Comstock was at the hospital or the house in the discharge of his duties. The effect of all these instructions on this question was to say to the jury that any information or knowledge acquired by Comstock while at the hospital or the house was not chargeable to defendant in error because he was not there in the discharge of his duties. This assumption by the Court was not only unwarranted, but was, it seems to us, in direct contradiction of the positive testimony, and by the instruction now under consideration and the direction or instruction given by the Court during the trial of the case, all knowledge acquired by Comstock while at the house or hospital, was eliminated from the consideration of the jury, and the jury were directed to disregard the conversations at the hospital and house unless they showed an admission on the part of Comstock that he *knew of the accident at the time it happened.*

This is not a case where the Court was expressing an opinion to the jury on the weight of the testimony, but it was a positive direction to the jury to disregard certain testimony for certain reasons, leaving them no discretion in the matter.

The instruction referred to in assignment of error numbered XII, began in these words:

"The Court permitted certain testimony concerning conversations alleged to have occurred at Merrill's house or at the hospital, between Comstock and I. B. Merrill and between Comstock and Mrs. Merrill. This testimony was admitted for a limited purpose, as the Court explained to you at the time."

The explanation referred to by the Court consists of the comment and the instruction given by the Court, which are the subject of the first assignment of error in this case. (Tr. of R., pp. 24, 25).

At the time these were given by the Court, Mr. Stevens had already testified that he left it to Comstock and Moore to arrange about the payment of Merrill's wages, his testimony on this subject being set out elsewhere in this brief, and the other testimony and facts and circumstances already in evidence at the time, show that it was a question for the jury to determine whether Comstock was not sent to the hospital or whether he was not there in the discharge of his duties. A fair inference from the testimony necessarily leads to the conclusion that he was.

In this comment and instruction the Court referred only to the testimony of Merrill, who was the witness then under examination. By the instruction referred to in assignment of error XII, which we have just quoted, the Court applied the instruction and comment he had given with reference to the testimony of Merrill, to the testimony of Mrs. Merrill as well, and the effect of the instruction given at the conclusion of the evidence was to say to the jury that, at that time, the testimony of Mrs. Merrill as well as Mr. Merrill, should be disregarded unless they showed that Comstock knew of the accident from the beginning and that there was, at the time of the giving of the instruction, *no evidence* that Comstock had been sent to the house or hospital by the company or that he was there on the business of the company. In other instructions the Court informed the jury that unless Comstock was there on the business of the company, none of the declarations made by him or the information acquired by him at the time, would be evidence of his knowledge of the accident. The Court should not have thus excluded the testimony of Merrill, because his conclusion as to the testimony was erroneous.

The other important question presented by the instructions involved in these assignments, is this:

ADMISSIBILITY OF DECLARATIONS AND CONVERSATIONS AS DEPENDENT ON THE QUESTION WHETHER THEY WERE MADE IN THE DISCHARGE OF A DUTY OR IN PURSUANCE OF AUTHORITY.

In instructing the jury that the declarations of Comstock and the conversations with him were only admissible in the event they were made in the line of his duty, or in the event he was sent to the hospital, where they took place, the Court lost sight of an elementary rule of evidence or failed to recognize the purpose for which they were offered, although this was fully stated.

The declarations and conversations were introduced in evidence solely for the purpose of showing that Comstock knew at the time they were made, or at some previous time, that Merrill had met with the accident in question. They were not made for the purpose of establshing an agency on the part of Comstock or of establishing any liability flowing from them or the facts they established.

The agency of Comstock with reference to the subject-matter of these conversations was conceded. It was conceded that it was the duty of Comstock, in the discharge of the obligation imposed by the policy, to exercise a reasonable degree of supervision over the employees in order to ascertain when accidents occurred and to report them, and by the imposition and acceptance of this duty, under the

issues in this case, the question whether Comstock knew of the accident in time to have reported it more than ten days prior to the time when it was reported, became material. In fact it was the chief question involved in the case.

We may concede that the declarations of an agent do not affect his principal unless they relate to some matter within the scope of his authority, and we may likewise concede, although the authorities are somewhat conflicting on this subject, that where it is sought to charge the principal with the legal consequences of the declarations of the agent, such declarations must be made during the existence of the agency.

In this case, however, whatever legal term may be applied to the relation between Comstock and defendant in error, a simple statement of this relation involves only the declaration that it was the confessed duty of Comstock to plaintiff in error as well as to defendant in error, to ascertain when employees were injured in the discharge of their duty and to impart that knowledge to those concerned, and that, under the issues in this case, the sole question was whether he had such knowledge, ten days prior to the time when it was imparted.

The probative value of the testimony on this subject, which was introduced by plaintiff in error, was a question of fact for the jury, and this value

did not depend on the conditions or the circumstances under which Comstock acquired his knowledge. It depended simply on the question to what extent it proved knowledge on his part.

In a very admirable treatise on evidence the following statement of the law is laid down:

"Mental states may properly be proved by extrajudicial utterances which logically tend to indicate their existence. * * * In all such cases the mental state is proved because it is a relevant fact and the extrajudicial statement is offered in evidence because it is a logically sound way of proving this relevant fact. * * * The evidence of unsworn statements in proof of mental states is primary, there being no superior grade of proof for establishing such a fact."

4 Modern Law of Evidence, Chamberlayne, section 2643, and cases cited.

"The case of agents presents no exception to the general rule of evidence that where the existence of a mental state by a given person at a certain time is probative, the fact may be proved by appropriate declarations of the person in question. In accordance with this general principle, the statements of an agent may be independently or circumstantially relevant to establish the existence on his part of intent or intention, knowledge, motive, or other material mental state. As the statement is merely a fact tending to prove the existence of a state of mind from which it would naturally arise, it may properly precede or follow the time at which the existence of the mental state is of importance. While it is essential that the relevant state of mind should be connected with the doing of some act within the scope of the agency it is not required

that the making of the statement which indicates its presence should have been so connected; provided, that the existence of the mental state at the time the declaration is made may be fairly deemed relevant on the question of its existence at the time involved in the inquiry. Statements too remote, in point of time, to be probatively relevant are rejected."

In the case of *Garretson vs. Merchants' & Bankers' Ins. Co.*, 60 N. W. 540, the Court said:

"The grounds of the motion are that the testimony was immaterial, and that it did not appear that Carpenter, at the time of the conversation, 'was acting in the capacity of president of the insurance company and transacting its business.' The case is argued to us on the theory that the Court sustained the motion to strike on the latter ground, by which we understand the same rule is to be applied to the imparting of knowledge or to the acquisition of knowledge by a corporation that would obtain where it sought to bind a principal by the acts and declarations of his agent, which is that when the acts are done or when the declarations are made he must be engaged in the business of his agency. We are not prepared to sanction such a rule, nor do we think that the learned judge who presided at the trial took that view of the law."

See, also,

International & G. N. R. Co. vs. Telephone, Tel. Co., 5 S W. 517.

The case of *Fidelity & Deposit Co. vs. Courtney*, 186 N. S. 3421, 46 L. Ed. 1193, was referred to by counsel for defendant in error in the court below and, presuming that it will be relied on as an

authority in this case, we desire to call the attention of the Court to the fact that it has not the slightest bearing on the question involved here.

An officer of the corporation in that case, whose duties were clearly defined and which did not in any way relate to or embrace the transaction which it was claimed imposed notice on the corporation, shared with one of the employees of the bank, in a corrupt transaction, which was for his own benefit, and it was claimed that, by virtue of the knowledge acquired by him in this way, the bank was charged with notice of the dishonesty of the employee involved in this transaction. The Supreme Court placed its decision upon two grounds:

FIRST: That the particular transaction which evidenced a lack of honesty and fidelity on the part of the employee, was in a department and branch of the business of the bank which was in no way entrusted to the official in question and which lay wholly beyond the scope of his authority and duty, and in this connection the Court said that if it had been the cashier instead of the officer in question, the bankrupt would have been charged with notice because of the fact that the transaction lay within the department or branch of the business of which the cashier had supervision.

In the case at bar it is conceded that the question of acquiring knowledge of accidents to em-

ployees and of imparting that knowledge was imposed on Comstock, and that defendant in error looked to him chiefly, if not alone, for the discharge of its duty to exercise such a reasonable degree of supervision of the business as to learn of accidents and report them.

SECOND: The Supreme Court also held, in the case in question, that it was an exception to the general rule because, where one who is the agent of another acts in respect to a transaction, even where it is involved within the scope of his agency, corruptly and in his own interest and not for the benefit of the principal, the principal is not charged in such cases with the act of the agent or with the knowledge so acquired.

The declarations of a party showing knowledge or lack of knowledge, where this is material to the issues in the case, and conversations with him and his representatives showing the same facts, are admissible whenever and wherever made, provided they are not so remote from the time during which the existence of the condition is material, as to render them of no value.

NINTH, FOURTEENTH AND FIFTEENTH ASSIGNMENTS —REQUIREMENT OF NOTICE A CONDITION PRECEDENT.

The policy in this case undertook to indemnify defendant in error *against loss arising from the liability imposed by law* for injuries to employees, etc.

Among the *agreements* and *warranties* contained in the policy was one that, "upon the happening of an accident, whether a claim was made in respect thereto or not, the assured would give notice immediately, and at the latest within ten days thereafter." The policy also contained a provision that no action should be brought thereon until after a judgment had been rendered against the assured and the claim had been paid.

The policy also contained the provision, "The special agreements and warranties herein contained shall be constructed as conditions precedent to the payment of any loss under this policy."

The Court refused to instruct the jury that a failure to give notice of the accident within the time required by the policy would defeat the action, but it instructed them that a failure to give the notice would not defeat the action if it appeared that the case could have been tried as successfully if notice had been given and if it appeared that plaintiff in error was not prejudiced by reason of the alterations in the hopper; and the Court also instructed the jury that, in order to constitute a defense, the failure to give or delay in giving the notice, must have been prejudicial to the rights of plaintiff in error.

These assignments of error present the question whether the failure to give notice according to the requirements of the policy would defeat the action

of defendant in error, without a further showing that it had been damaged by such failure.

We believe that the authorities are almost unanimous in holding that a condition in a policy of this character, requiring the giving of notice of an accident, is a condition precedent, and that there must be a compliance with it in order to entitle the assured to recover. Among the cases affirming this rule are the following:

Employers Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54;

London Guarantee & Acc. Co. vs. Siwy, 66 N. E. 481;

Underwood Veneer Co. vs. London Guarantee & Acc. Co., 75 N. W. 996;

Green vs. Northwestern Live Stock Co., 54 N. W. 349;

California Sav. Bank vs. Am. Surety Co., 87 F. 118;

Ermentraut vs. Girard Fire & Marine Ins. Co., 65 N. E. 746;

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 746;

Travelers Ins. Co. vs. Myers, 57 N. E. 458;

McFarland vs. United States Mut. Acc. Assn., 27 S. W. 436;

11 Am. & Eng. Ann. Cases 253.

4 Cooley's Briefs Ins., p. 3570.

In the case of *Underwood Veneer Co. vs. London Guarantee & Acc. Co., supra,* the Court distinguished and criticized the two cases of *Anoka Lbr. Co. vs. Fidelity etc. Co.,* 65 N. E. 353, and *Grand Rapids Elect. Light etc. Co. vs. Fidelity etc. Co.,* 69 N. W. 249, and used this language:

"After careful consideration we are constrained to hold that the conditions indorsed upon the policy and quoted above were conditions precedent.* * * True, there is no forfeiture clause in the contract. Nevertheless, the plaintiff, in order to maintain this action, was bound to perform such condition precedent."

In the case of *Travelers' Ins. Co. vs. Myers, et al.,* 57 N. E. 458, the Court, in speaking of the condition requiring notice, used this language:

"It is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss as in policies of fire and life insurance. It is clearly a matter of substance in the contract, because the obligation of the insurer is not against the mere happening of an accident or an injury, but against 'loss from liability' to employees, who may be accidentally injured. * * * In a very little time the facts may, in a great measure, fade out of memory, or become distorted; witnesses may go beyond reach; physical conditions may change; and, more dangerous than all, fraud and cupidity may have had time to perfect their work. Therefore this stipulation is vital to the contract."

In the absence of a provision in the policy de-

claring the condition in question to be a condition precedent, its character is ordinarily determined by a consideration of the question whether it is a condition which, by the terms of the contract, is required to be performed before the right in question attaches or comes into existence. In those cases where it appears from the nature of the contract that it was contemplated by the parties that the condition should be performed before the right attached, it is declared to be a condition precedent, without reference to other considerations.

Where the contract is to indemnify against *loss* from liability it is held that no right exists against the indemnitor until the *loss* has been sustained, and this loss is defined by the courts (as well as by the terms of the contract in question here), to be the payment of the judgment, and in all cases where this language is construed this rule is adopted.

Ford vs. Aetna Life Ins. Co., 126 Pac. 69;

Allen vs. Gilman, McNeil & Co., 137 F. 136;

Conolly vs. Bolster, 72 N. E. 981;

Allen vs. Aetna Life Ins. Co., Garnishee, 145 F. 881;

Puget Sound Imp. Co. vs. Frankfort etc. Ins. Co., 52 Wash. 124;

Burke vs. London Guaranty & Acc. Co., 92 N. Y. Supp. 652;

Cushman vs. Carbonado Fuel Co., 122 Ia. 656;

Sheard vs. United States Fidelity & Guar. Co., 58 Wash. 29;

Finley vs. United States Gas Co., 113 Tenn. 597;

Frye vs. Bath, Gash & Elec. Co., 97 Me. 241;

Travelers Ins. Co., vs. Moses, 63 N. J. Equity 260;

Byers vs. International Aluminum Co., 101 N. Y. Supp. 83.

In accident policies where the right to compensation accrues upon the happening of the accident;

In fire insurance cases where the loss to the insured takes place on the destruction of the property;

Under employers liability policies where the contract is to indemnify *against liability* as opposed to *loss* from liability; in the absence of a provision in the policy making conditions precedent the conditions with reference to notice which are to be performed subsequently to the attaching of the loss or liability and prior to the enforcement of the right arising therefrom; such conditions are held to be conditions subsequent. The cases clearly make the distinction between conditions in policies with the different provisions indicated.

Grand Rapids Elect. Light etc. Co. vs. Fidelity etc. Co., 69 N. W. 249;

Employers Liability Assur. Corp. vs. Light, Heat & P. Co., 63 N. E. 54;

Solomon vs. Cont. Fire Ins. Co., 55 N. E. 279;

California Sav. Bank vs. Am. Surety Co., 87 F. 118;

Travelers' Ins. Co. vs. Myers, 57 N. E. 458;

McFarland vs. United States Mut. Acc. Assn., 27 S. W. 436;

Woodmen's Acc. Ass'n vs. Byers, 87 N. W. 546;

London Guaranty & Acc. Co. vs. Siwy, 66 N. E. 481;

Woolverton vs. Fidelity & Casualty Co., 82 N. E. 745;

Tripp vs. Provident Fund Soc., 37 Am. St. Rpts. 529.

Where, however, the condition in question was one to be performed before the loss had been sustained by the assured by the establishment of a liability against it and the discharge of it, and where, in addition thereto, the policy itself contains a stipulation making the condition in question a condition precedent, no room is left for the argument or discussion and the condition is treated by the courts and enforced as a true condition precedent.

In the case of *Woodmen's Ass'n vs. Byers, supra,*

the question of the character of the condition was disposed of in these words:

"It is well to note that we are not considering a question of complying with conditions before loss or injury."

In the case of *Tripp vs. Society, supra,* the Court said:

"The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must therefore receive a liberal and reasonable construction in favor of the beneficiaries."

It was treated by the Court, for the reasons indicated in the language above, as a condition subsequent.

In construing a policy containing any condition which is made a condition precedent by its terms, the courts universally and invariably hold that the condition must be treated as a condition precedent because it is so written in the contract, except that in one or two cases, where the condition was of such a character as that the Court was able to say that it bore such a relation to the objects and purposes of the contract that the parties could not, even by so agreeing, make it a condition precedent. In other words, where, in its character, it was clearly and emphatically a condition subsequent, they held, in the cases just suggested, that the stipulation of the parties could not change its character.

CONDITION PRECEDENT—NOT NECESSARY TO SHOW DAMAGE FROM ITS BREACH.

The vital importance of the giving of notice of an accident within the time fixed in the policy is well pointed out in the language we have just quoted from the case of *Travelers' Insurance Co. vs. Myers, supra.* The condition requiring the giving of immediate notice, which would enable the insurance company to interview the witnesses before they had been tampered with; to photograph the premises; to preserve the evidence, and to successfully defend the action, should be treated as a condition, the breach of which prevents a right of action from attaching and renders nugatory the contract providing for indemnity. The difficulty of showing damage in such cases is apparent to any judge or lawyer. Whether there was any damage, of course, would depend on the result of the case against the assured and on the fact whether the conditions were such that the case could have been successfully defended at the one time as at the other, and a consideration of this question necessarily involves the effect of the presence or the absence of certain testimony or the effect of certain alterations or changes on the result of the trial. This is a matter so difficult to establish that, to require for such a breach a showing of damage is to substitute a fiction or an idle pretense for a right carefully guarded. The jury that tried the case cannot be examined to know whether the absence of certain testimony

affected the result of the case or whether the presence of certain testimony likewise affected it, or whether the verdict of the jury would have been different under some other state of facts. To require a showing of damage under such circumstances is in most cases a mockery and the facts of this case demonstrate this fact in a striking manner.

There was one witness who saw the accident. Some months later it was claimed by defendant in error that he was still available as a witness at the time the suit was brought, although it was conceded that he was not available at the time of trial and that defendant in error spent much money in an effort to find him. It was claimed that he was somewhere about town at the time the notice of the accident was given and the suit was begun, but apparently defendant in error was never able to find him, although during the intervening time he had been in its employ.

Merrill claimed that the top plank on the side of the hopper, being insecurely nailed, split, and that part of it broke off and caused him to fall on the hopper. Long before the notice of the accident was given and long after defendant in error knew of the accident, it caused the hopper to be demolished and enlarged and caused the very plank which Merrill claimed split off and broke with him, to be knocked off and thrown to one side so that its identification was rendered difficult.

At the time the notice was given to plaintiff in error none of the plank that were on the hopper at the time of the accident were still on it, and if Merrill's statement that a plank broke off with him was untrue, as was contended by Comstock in the Merrill case, then when defendant in error knocked off this very plank and threw it to one side, it rendered it difficult to show that Merrill's statement was false. If, on the other hand, as testified to by Merrill, Comstock nailed back on the hopper the part of the plank that broke off, and all the plank was subsequently knocked off of the hopper and thrown under the warehouse, the difficulty of determining whether these conditions prevented a successful defense in the Merrill case is apparent.

It will not do to say in answer to this that the entire hopper and all the planks were destroyed by fire at some subsequent time and before the trial. If notice of the accident had been given before the hopper had been changed, photographs of it could have been taken, witnesses could have examined it and it could have been demonstrated conclusively whether or not the plank did split off.

It is evident that, by failure to give notice and the change in the hopper after knowledge of the accident and before the notice was given, that, whether or not plaintiff in error was damaged, is a mere matter of speculation, subject to no fixed standard and was subject to the mere whim and

caprice of the jury, anxious to find a verdict in favor of the individual and against the insurance company.

Conditions of this character in policies of this kind demand, in common justice and fairness, a strict interpretation and require compliance with them as the basis of any right to indemnity under the policy. If the trial had taken place and there had been a breach of some condition subsequent to the establishment of liability and the payment of it by defendant in error, the question whether the breach of that condition imposed any damage on it, would be the subject of a more accurate determination, but to impose on the insurance company the burden of showing that the trial of the case against the assured was prejudiced by the existence or non-existence, or the presence or absence of certain testimony, affecting the verdict of the jury, is carrying the doctrine which the Court doubtless had in mind to an extreme unwarranted by any rule laid down in any of the cases of which we have knowledge.

Where the condition is a condition precedent, its breach is fatal, without regard to the question of damage resulting from it. The authorities all affirm this proposition.

In the case of *National Surety Co. vs. Long*, 125 F. 887, it is said:

"Moreover, it is not indispensable to the validity or to the enforcement of this plan covenant of the

obligee—this condition precedent to the liability of the defendant under the bond—that the latter should either establish its beneficence or its materiality, or that it should show that it has sustained injury from the failure to fulfill it. Parties to agreements have the right and the power to contract that things immaterial as well as things material shall be the subjects of their warranties, or of conditions precedent to their respective liabilities, and their contracts in the one case are as legal and binding as in the other. The all-sufficient, the conclusive, answer to the suggestion that the subject of the warranty or of the condition precedent is immaterial, and its breach without effect, is that the parties had the right to agree and they have contracted otherwise. The immateriality of a warranty or of a condition precedent made by the agreement of the parties, and the innocuousness of a failure to perform it, do not nullify or mitigate the fatal effect of the failure prescribed by their contract. *Rice vs. Fidelity & Deposit Co.*, 103 Fed. 427, 430, 432, 43 C. C. A. 270, 273, 275; *Indemnity Co. vs. Wood*, 19 C. C. A. 264, 73 Fed. 81, 84; *American Credit Indemnity Co. vs. Carrollton Furniture Mfg. Co.*, 36 C. C. A. 671, 95 Fed. 111, 113; *Jeffries vs. Insurance Co.*, 22 Wall, 47, 54, 22 L. Ed. 833; *Insurance Co. vs. France*, 91 N. S. 510, 512, 23 L. Ed. 401; *Anderson vs. Fitzgerald*, 4 H. L. Cas. 483, 487; *Cazenove vs. Assurance Co.*, 6 C. B. (N. S.) 437, 450, 451, 6 Jur. (N. S.) 826; *Price vs. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166."

In the case of *Imperial Fire Ins. Co. vs. County of Coos*, 151 U. S. 542, 38 L. Ed. 231, the question was stated in this way:

"The proposition is that unless such repairs and alterations had the effect of either causing the fire or of increasing the risk at the time it occurred,

then there was no breach of the condition contained in the contract."

The Court said:

"The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reason for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made."

In this case the Supreme Court, quoting from a Minnesota case, used this language:

"These conditions when plainly expressed in a policy, are binding upon the parties and should be enforced by the courts, if the evidence brings the case clearly within their meaning and intent. It tends to bring the law itself into disrepute when, by astute and subtile distinction, a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligaion of the contract."

The case of *Hope Spoke Co. vs. Maryland Cas. Co.*, 143 S. W. 85, also contains a full review of the question, citing many cases and distinguishing those where the conditions were conditions precedent from

those where they were conditions subsequent. It uses this language:

"The following authorities fully sustain the view that a failure to give notice within a specified time in accordance with the terms of the policy, does not operate as a forfeiture of the right to recover, unless the policy in express terms or by necessary implication makes the giving of notice within a time specified, a condition precedent to recovery. *Accident Ins. Co. vs. Fielding*, 35 Colo. 19, 83 Pac. 1013, 9 Am. & Eng. Ann. Cas. 916; *Southern Fire Ins. Co. vs. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216; *Insurance Co. vs. Downs*, 90 Ky. 236, 13 S. W. 882, 12 Ky. Law. Rep. 115; *Flatley vs. Insurance Co.*, 95 Wis. 618, 70 N. W. 828; *Tubbs vs. Insurance Co.*, 81 Mich. 646; 48 N. W. 296; *Steele vs. German Ins Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Mason vs. Insurance Co.*, 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; *Taber vs. Insurance Co.*, 124 Ala. 681, 26 South. 252."

"Nothing in the opinion of this Court in *Teutonia Ins. Co. vs. Johnson*, 72 Ark. 484, 82 S. W. 840, conflicts with the views we now express, for that decision was based upon the fact that under the terms of the policy the requirement for notice was made a condition precedent to recovery."

The case just referred to held that the condition then in question was not a condition precedent and that the failure to give notice within the time fixed by the policy did not defeat the action unless damage was shown, but the case clearly stated the proposition that if there had been a provision in the policy making the condition a condition precedent, the decision would have been otherwise.

The following extract, taken from the text of the opinion, indicates the truth of what we say:

"The absence of language indicating an intention to make compliance with that provision a condition of recovery, is noticeable. In most of those cases it appears that there were other clauses in the contract providing that the stipulation for giving notice should be deemed a condition precedent."

In the case of *Jeffries vs. Economical Mut. Life Ins. Co.*, 22 Wall. 47, 22 Law Ed. 853, certain statements and declarations were made and it was claimed that they were not material and therefore did not operate to defeat the liability. In this case the Court said:

"The statements need not come up to the degree of warranties. They need not be representations even, if this term conveys an idea of an affirmation having any technical character. 'Statements and declarations' is the expression—what the applicant states and what the applicant declares. Nothing can be more simple. If he makes any statement in the application it must be true. If he makes any declaration in the application it must be true. A faithful performance of this agreement is made an express condition to the existence of a liability on the part of the company.

"There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it.

"It is the distinct agreement of the parties, that the company shall not be deceived as to its injury or as to its benefit. The right of an individual or

a corporation to make an unwise bargain is as complete as that to make a wise bargain."

In the policy in question here, the condition under consideration was one of the special agreements and warranties and it was provided that "the special agreements and warranties herein contained shall be construed as conditions precedent to the payment of any loss under this policy."

There is a class of cases holding that where the performance of the condition is required before the maintenance of an action, unless the policy contains a provision making the performance of the condition a condition precedent or declaring a forfeiture for a failure to comply therewith, a compliance before the bringing of the action will be deemed a sufficient compliance so as to prevent a forfeiture, in which case the question is one of the damage sustained by a breach of the condition.

The cases just referred to, however, are wholly different from the case at bar and have no application to it on account of the character of the provision in question. Typical among these cases is *Southern Fire Ins. Co. vs. Knight*, 113 Ga. 622, 52 L. R. A. 70. In these cases, however, it is conceded that if there is an express provision making the condition a condition precedent to the maintenance of an action on the policy, the breach is fatal.

It will be observed that most of these cases are cases in which the condition was to be performed after the loss had occurred. In this case the condition was to be performed before the loss by the assured occurred.

In the case of *Parmelee vs. Aetna Life Ins. Co.*, 166 Fed. 741, there was a provision requiring the assured to give notice if a suit was brought and to forward every summons or process as soon as it should be received. There was a failure to do this and default was entered against the assured, whereupon the insurance company disclaimed any responsibility for want of notice. It appeared that the return on the summons was false and it was contended that it was therefore no summons and that the failure to send it to the insurance company was not a breach of the condition. The Court held that the insurance company might show that the summons was not in fact a summons and held that it was liable. None of the conditions of the policy are set out except the one with reference to the sending of the summons or other process. It does not appear whether there were any conditions in the policy making the performance of the condition a condition precedent, or whether there were any conditions in the policy making a failure to perform it operate as a forfeiture of the right of action.

The Court, in this case, without apparently having given any consideration to the question, or possibly deeming it a condition subsequent, said:

"In contracts of this kind, to escape liability, the insurer must show that the breach is something more than a mere technical departure from the letter of the bond—that it is a departure that results in substantial prejudice and injury to its position in the matter."

Citing *Rumford Falls P. Co. vs. Fid. & Cas. Co.*, 92 Me. 574, 43 Atl. 503; *Ward vs. Maryland Cas. Co.*, 71 N. H. 262, 51 Atl. 900.

The language used by the Court, to which we refer, was not necessary to the decision of the Court, for it had already been held that the assured could show that the summons was not in fact a summons. In addition, it does not appear that the sending of the summons was made a condition precedent and if it was not, in the absence of a provision making a failure to send it operate as a forfeiture, it would be a question of damage. The language of the Court, "contracts of this kind," we presume had reference to the particular character of the contract in question.

The case of *Rumford Falls P. Co. vs. Fid. & Cas. Co., supra*, cited by the Court, did not involve, in any degree, this question. The sole question was whether certain misconduct on the part of the assured and its attorneys, constituted a breach of the condition requiring them to render reasonable aid, and prohibiting them from interfering with the case. It was claimed that the superintendent of the assured said in the presence of the justice and several of the jurors trying the case:

"This is the Fidelity & Casualty; they insure us, and they are the ones who are responsible. We wouldn't defend this case."

The Court held that this was not a breach of the condition requiring them to render reasonable aid and that in any event the assured could not be affected by such an unauthorized and unexecuted suggestion by the superintendent. The Court disposed of the matter by saying that the facts failed to show any want of good faith on the part of the assured or any omission to perform the obligations imposed upon it by the terms of the policy.

How this case can be authority for the decision in the Parmelee case we do not see.

In the case of *Ward vs. Maryland Casualty Co., supra*, cited by the Court, it is held that the failure to send the summons immediately, did not forfeit the rights of the assured, because there was no provision in the policy making such failure a forfeiture, but the question whether it was necessary to show damage in such a case was not before the Court and was not discussed by it.

In the *Ward* case there were provisions in the policy making certain conditions conditions precedent, but the sending of the summons and complaint was not among these conditions. It was provided, however, in the policy as a condition precedent, that the assured should aid in securing information affecting settlements, etc. It was claimed that the

assured failed to send a copy of the summons or process and that this operated to defeat the action. The Court disposed of the contention in these words:

"To the defendants' claim that their liability under the policy was ended by plaintiffs' failure to forward to the defendants' counsel the summons or paper served upon the plaintiffs in the *O'Connell* action immediately after service, in compliance with the counsel's request, it is a sufficient answer that there is no provision in the policy making such failure a cause of forfeiture of the plaintiffs' rights. Such failure would be competent evidence on the question whether the plaintiffs reasonably aided the defendants in securing information concerning the accident. Its weight would depend upon circumstances and must be determined by the tribunal charged with the duty of deciding questions of fact."

We cannot see how this case has any bearing on the question whether, on a breach of a condition precedent, it is necessary to show that some damage resulted. Evidently the *Parmelee* case followed this case on the question of the construction to be put on the provision with reference to the sending of the summons or process to the insurance company, and it is fair to presume from the report of the *Parmelee* case, that the policy was similar to the one involved in the *Ward* case, in that it contained no provision making the sending of the summons a condition precedent, or a failure to send it operate as a forfeiture. In each case the condition was treated as a condition subsequent.

These cases are referred to by us because much stress was laid on them in the former hearing of

this case before this Court on the question of the construction of the provisions requiring notice within ten days and incidentally the question involved here was referred to by defendant in error as being decided in these cases.

We may say, in leaving this question, that the provisions of the policy in the case at bar clearly indicate that among the rights and benefits sought to be reserved to the plaintiff in error, by prompt notice of the accident, was the right to compromise and settle the claim before it had passed into the hands of attorneys and before any action had been brought. This, as all men know, is one of the important rights affecting insurance of this character. The failure to give notice until the suit was brought in this case, after a long period of time in which defendant in error undoubtedly knew of the accident, should, of itself, be treated as being conclusive evidence of damage, because it undoubtedly deprived plaintiff in error of an opportunity to settle the claim before suit was brought. The impracticability of showing that the claim would or would not have been settled even if plaintiff in error had had the opportunity, indicates that inquiry on this subject should halt at this question.

SIXTEENTH ASSIGNMENT.

This assignment has reference to the instruction given by the Court to the jury that they should

receive the evidence of the oral admissions and declarations with *great caution.*

When it became necessary for Merrill to go to the hospital for the operation on account of the injury to his kidney, he telephoned to Comstock, the foreman, who came to his house and assisted in removing him to the hospital. While at the house Comstock said to Mrs. Merrill that he was sorry Merrill was hurt and that they would see to the payment of his wages. He also made a statement of a similar character to Mrs. Tute, one of the neighbors who was present, and afterwards, at the hospital, he told Merrill that the company did not want any suit about the matter and that they would pay his wages.

It was admitted that the question of the payment of Merrill's wages was discussed between Comstock and one of the officers of the company and that these wages were subsequently paid for some time.

Comstock testified in the case that he did not know that Merrill had met with an injury and that when he saw him at the house and hospital nothing was said about his having been injured and that he did not previously know and did not find out then, that Merrill had met with an accident resulting in his condition.

The declarations and conversations were offered in evidence for the purpose of proving that Com-

stock did know of the accident and injuries resulting therefrom. The Court instructed the jury that these particular declarations should be received by them with great caution and in the course of his instruction on the subject, stated to them that one of counsel (alluding to counsel for defendant in error), had given some reasons for this and he would give others. These declarations and admissions and conversations constituted the evidence chiefly relied on by plaintiff in error to show knowledge on Comstock's part. In fact, it was difficult, under the circumstances, to show knowledge in any other way, although it was also shown by the statement of Merrill that Comstock knew of the accident at the time it happened. The instruction of the Court practically obliterated the testimony as to the declarations and conversations and took it from the jury. The declarations were strongly corroborated by circumstances and they were highly probable in character.

We concede the right of a judge of a United States court to comment on the credibility of a witness and the weight of the evidence, if this comment be of such a character that it does not control the jury but leaves the matter for their determination in accordance with their own judgment, discretion and experience.

It may be true that human experience has shown that, in determining the weight of evidence of different kinds, it has been found that the recital

after a long lapse of time, of conversations and declarations, is less liable to be correct than is the recital by the witness of facts coming under his observation, which, being seen instead of being merely heard, more powerfully impress themselves upon his memory.

We believe that this idea might be suggested by the Court to a jury in general terms, with the statement that it was for the jury to determine from the nature of the declarations and admissions, and from the absence or the presence of corroborative circumstances, whether they would give to the particular evidence under consideration, credit and belief, or whether they would receive it with caution.

We take it that in dealing with *specific* evidence of admissions and declarations in any case, whether that evidence is to be received with caution depends on whether it is corrorborated; whether it is probable; whether it is consistent with the other facts in the case. If this be true, when a judge, instructing the jury with reference to such evidence, directs them to receive *it* with great caution, he practically decides that it is not corroborated by other evidence; that it is not probable, or that it is not consistent, and thus he takes away from the jury the right to decide this most important question.

The rule on this subject is aptly stated in the

case of *Vicksburg and Meridian R. R. Co. vs. Putnam,* 118 U. S. 545, 30 Law. Ed. 257, as follows:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

We contend that this direction by the Court forced the jury to view this evidence with suspicion and receive it with caution, although it may in their opinion have been so strongly corroborated by other evidence and collateral circumstances as to possess great weight. In our opinion the expression by the Court took the form of a statement of law which was controlling on the jury.

In the case of *Games et al. vs. Stiles, ex dem. Dunn,* 14 Peters 322, 10th Law Ed. 47, the Court said:

"The principle is well established that a court may give their opinion on the evidence to the jury, being careful to distinguish between matters of law and matters of opinion in regard to the facts. When a matter of law is given by the Court to the jury it should be conceded as conclusive, but a mere matter of opinion as to the facts will only have such influence on them as they think it is entitled to."

We believe that the instruction violated this rule and that it deprived the jury of the right to determine for themselves whether the admissions and declarations in evidence in this case were of such a character as to bring them within the operation of the rule, if there is such a rule, that oral declarations should be received with great caution.

As a matter of fact the only denial of these declarations and admissions was the denial of an interested witness and he was opposed by three disinterested witnesses, one of whom had never had any connection whatever with the controversy.

After delivering this instruction, which was directed at some of the most important testimony of plaintiff in error, the Court proceeded to say that the argument of one of the attorneys of defendant in error showed why this was true and then added reasons of his own. This, in effect, approved of the argument of the attorney of defendant in error and gave to it the sanction of the Court and of necessity it operated as a disapproval of the argument of the attorney of plaintiff in error on this subject and indicated that the court did not sanction it. We think this was error and that it was harmful and reversible error.

In the case of *Phoenix Ins. Co. vs. Gray*, 38 S. E. 992, the question of the legal effect of such an instruction as the one involved in this case, is discussed very fully by the Supreme Court of Georgia.

In Georgia there is a provision in the statute which authorizes the Court to instruct the jury to the effect that admissions of parties should be scanned with care. An instruction was asked incorporating this idea, but it proceeded to say that when admissions were satisfactorily proved they constituted a ground of belief upon which the mind reposes with strong confidence.

It was claimed that this instruction should have been given, but the Court held that while the first part of it was in accordance with the statute, the latter part was not justified because, while it may have correctly stated a rule, it amounted, in effect, to the statement of a rule of law which controlled the decision of the jury.

In speaking of this question the Court said:

"Another proposition which it contains is that, when an admission has been deliberately made, and it has been satisfactorily shown that the precise admission sought to be introduced was made by the party, then that admission is usually received as satisfactory proof of the fact to which the admission relates. Undoubtedly this must be the conclusion which any reasonable mind would reach when it seeks to arrive at the proper determination of a fact through the medium of evidence. While this is true, yet, if the jury considering the evidence should be so instructed, there is no escape from the conclusion not only that the jury are told one kind of evidence should, in their deliberation, be given more weight than another, but they are also told that proof of an admission, after having been cautiously scanned, is proof of the fact ad-

mitted * * * * It may be sound philosophy, founded upon human experience and a knowledge of human character, that an admission made voluntarily by a party against his own interest constitutes very strong evidence of the fact admitted. It is often the case that learned writers of law books, and even courts, in the discussion of principles involving the weight of testimony and the credibility of witnesses, advance ideas, sound in themselves, which are not intended to be declared as positive law, but as a safe rule to guide mankind generally in reaching conclusions upon stated facts; but it does not follow from this that, however sound the philosophy of such rules may be, a court should adopt them as positive law, apply them to a particular case, and give them as rules by which the jury should be governed in their deliberations. * * * In some instances no doubt the admissions of a party against his interest are entitled to great weight, but what weight should be given them would depend largely upon the circumstances under which they were made. As to the effect of such circumstances upon the weight of the testimony, the jury alone should judge."

In the case of *Mercer vs. State*, 17 Ga. 169, an instruction of this kind was sustained, but the decision was upheld largely on account of the fact that the trial judge also told the jury "that they must weigh them as any other testimony."

As we have stated, nothing was said by the trial judge in this case indicating that he was merely stating a rule which men ordinarily apply in the determination of the value of evidence, and that he was not stating a proposition of law which was controlling on them. Undoubtedly the trial judge

crossed over the border and undertook to declare to the jury, in the form of an instruction as to the law of the case, a rule which is not a rule of law and whose correctness when applied to any particular case, depends on facts of which the jury should be the judges, and as to which no suggestions were made by the Court in his instruction.

The evidence in this case was conclusive on the question whether defendant in error knew of the accident to Merrill. It was conceded by defendant in error, during the trial, that Merrill met with no accident in the month of June, and Merrill testified that he fell and hurt himself only once (Tr. of R., p. 132), and it was alleged in the complaint and amended complaint in this action that he sustained certain injuries as a result of the accident, for which defendant in error was compelled to pay the sum of money for which this action is brought. Comstock fixed the time of the accident in June, while Merrill fixed it in July. The dispute as to the time is unimportant. Comstock had testified that Merrill told him in June that he had fallen and hurt his side and he also testified as follows:

"At the time the summons and complaint were served and I had the talk with Mr. Moore, I spoke to him about Merrill having fallen in June, I mentioned that in connection with the summons and complaint because I knew that that was the time he fell on his side and broke the plank off the hopper.

"That was the time he fell on his side, but the plank was not broken off the hopper. I swore in Merrill's case that the plank had never broken off the hopper and that was the point in issue in that case."

In October, 1909, defendant in error addressed a letter to the agent of plaintiff in error in which it said:

"In July of this year one I. B. Merrill was hurt while stepping from the platform of the hopper to a car on our side track and not until a few days ago did we have any idea that there would be a suit in consequence."

Merrill testified that Comstock knew of the accident at the time it happened and that he discussed it with him and that, during the absence of Comstock, while Bass was acting as foreman, he discussed the matter with Bass, who said the hopper ought to have been fixed. (Tr. of R., pp. 77, 79,61.)

Stevens had testified that he looked to Comstock, who had supervision of the men, to notify him of accidents to them, and that he also looked to Bass, when he was acting as foreman, to report such occurrences. (Tr. of R., 68-72.)

The testimony clearly shows that Comstock knew of the accident at the time it happened and that when the suit was brought he knew that it was brought on account of the accident of which he had previous knowledge.

Merrill's testimony that he informed Bass of the

accident and all the details of it at some time in July or August, was uncontradicted, as was the fact, that at that time Mr. Moore was acting as foreman in Comstock's place.

The letter of defendant in error, an extract of which is set out above, shows conclusively that defendant in error knew of the accident and did not report it because they though that the payment of the wages, as agreed upon by Comstock and Merrill at the hospital, would end the matter and that there would be no suit on account of the accident.

Under these circumstances we believe that a verdict in favor of plaintiff in error should have been directed by the court and the motion of plaintiff in error should have been granted.

In addition to this, the testimony introduced by defendant in error and that extracted from its witnesses on cross-examination, showed that the hopper, on one plank of which Merrill claimed to have fallen and which plank he claimed broke off with him, had been entirely changed, and that all the planks had been knocked off and new posts put in, all of which was done in July or August, after the accident and more than thirty days prior to the commencement of the action and the giving of the notice.

The testimony also showed that at the trial of the Merrill case the chief question was whether the plank had broken off and whether Merrill had

fallen on it, but inasmuch as this plank had previously been knocked off, either by Merrill or dedefendant in error itself, it was impossible to definitely determine whether the plank had broken with Merrill. Defendant in error claimed that it had not; that it was intact at the time it changed the hopper and had it knocked off. Of course the hopper was destroyed by fire during the pendency of the Merrill case. If, as contended by defendant in error, the plank was on the hopper intact after the accident, it would have been very easy, upon notice being given to the insurance company, for it to have preserved such testimony on the subject as could not have been overcome.

We believe that the facts and circumstances in this case indicate that if defendant in error had not made the change in the hopper which, in effect, removed and knocked off from it the very plank which Merrill claimed broke off with him, Merrill would never have brought an action based upon this claim. The action of defendant in error in changing the hopper and knocking off the plank on the sides of it, invited the action which Merrill subsequently brought and this act on the part of defendant in error rendered it impracticable to successfully contest before a jury, the question whether the plank did break by reason of its being insecurely nailed.

We think that the question whether plaintiff in error was damaged by the failure to give the no-

tice was not in the case and a new trial should be granted for this reason, but the Court saw fit to submit both issues to the jury and, as we have already pointed out, it erred in submitting either issue.

The case should be reversed.

Respectfully submitted,

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